FILE COPY.

Office Supreme Court U. S.
FILED
APR 2 1906
JAMES H. MCKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 266.

P. O. COX, SAM LEVY AND W. M. EVANS,

Plaintiffs in Error,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF OF PLAINTIFFS IN ERROR.

F. E. ALBRIGHT,
E. C. ORRICK,
J. C. TERRELL, JR.,
DEWEY LANGFORD,
Counsel for Plaintiffs in Error.

The A. B. Moore Printing House, 213 Main St., Fort Worth.

20

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 266.

P. O. COX, SAM LEVY AND W. M. EVANS,

Plaintiffs in Error,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF OF PLAINTIFFS IN ERROR.

F. E. ALBRIGHT,
E. C. ORRICK,
J. C. TERRELL, JR.,
DEWEY LANGFORD,
Counsel for Plaintiffs in Error.

STATEMENT.

This suit was brought in the District Court of Hamilton County, Texas, by the State of Texas against P. O. Cox,

principal, and Sam Levy and W. M. Evans, sureties, to recover penalties upon liquor dealer's bond aggregating the sum of $6,000, alleging briefly the occupation of Cox as a licensed liquor dealer, and the execution of the bond by him with Sam Levy and W. M. Evans as sureties, and seeking to recover penalties provided in said bond for violating the conditions of said bond, as follows:

That the said P. O. Cox & Co., their agent or employe, will not sell, or permit to be sold, in their house or place of business, nor give nor permit to be given any spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, to anyone under the age of 21 years, and that they will not permit anyone under the age of 21 years to enter and remain in his house or such place of business. That they did sell to William W. Thompson, a person under the age of 21 years, without the knowledge or consent of anyone authorized to give same, upon six different, distinct and separate occasions, intoxicating liquors, and upon six different occasions permitted said Thompson to enter and remain in the defendant's (Cox) place of business, and sought therein to recover the total sum of $6,000 liquidated damages for the breach of said bond.

There was also filed at the same time in cause No. 267, pending on writ of error in this court, a suit by the father of said Thompson against the plaintiffs in error, seeking likewise to recover $500 for each infraction of the same condition of the bond.

Defendant answered by general demurrer and by special demurrer, attacking the constituitonality of the act giving the right of action, on the ground that the act

exempts from the provisions of the statute people engaged in the same business—that is, the selling of vinous and intoxicating liquors, providing they sell wines made from grapes grown in the state by the seller, while in the hands of the maker or producer thereof. Also by general denial and special answers, which are not necessary to be noted in this connection. [Tr., p. 10.]

On a presentation of the demurrers the court overruled same. [Tr., p. 35.] Upon the trial of the case in the case of State vs. P. O. Cox et al., verdict was rendered in favor of the State against P. O. Cox, Sam Levy, William M. Evans for $1,500 for permitting W. W. Thompson to enter and remain in the saloon three times, and in the case of P. O. Cox et al. vs. W. B. Thompson for $3,000, for three sales of intoxicating liquors and for entering and remaining in the saloon three times, $500 for each infraction of the bond. The case was duly appealed to the Court of Civil Appeals for the Third Supreme Judicial District at Austin. Among other things it was assigned as error [Tr., p. 42] that the law requiring the giving of bond was unconstitutional, being violative of Article 14 of the Constitution of the United States, and that the act requiring the giving of the bond in question and providing for penalties therein was void in that same was violative of Section 8, Article 1, of the Constitution of the United States, same being in restraint of interstate commerce. [Tr., p. 42.] Thereafter, on Jan. 11, 1905, the Court of Civil Appeals affirmed said judgment and certified said decision to the lower court for observance.

Motion for new hearing was duly made in the Court of Civil Appeals and ovrruled. Whereupon the plaintiffs

in error applied to the Supreme Court of the State of Texas for a writ of error [Tr., pp. 53-62], which writ of error was duly denied. [Tr., p. 62.] Whereupon plaintiffs in error applied for a writ of error to the Court of Civil Appeals for the Third Supreme Judicial District of Texas [Tr., p. 64], in order to bring the case before the Supreme Court of the United States, which application was duly granted by the Chief Justice of said Court of Civil Appeals and a supersedeas bond filed by P. O. Cox, Sam Levy and W. M. Evans and the United States Fidelity and Surety Company as surety, and errors were assigned to this court as follows:

ASSIGNMENTS OF ERROR.

I.

The court erred in holding that the provisions of Chapter A1, Title CIV, of the Revised Statutes of the State of Texas and of the amendments thereto of the General Laws of the State of Texas of 1897, Chapter 158, are not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, for that the State of Texas, by and through the provisions of said Chapter A-1, Title CIV, and the amendments thereto in Chapter 158 of the Acts of 1897, assume to and seek:

(1) To deprive the plaintiffs in error and certain other citizens of the United States of America and of the State of Texas of rights, privileges and immunities secured to other citizens of the United States and of the said State.

(2) To deprive plaintiffs in error and other citizens of the United States of their property without due process of law.

(3) To deprive and to deny to the plaintiffs in error and certain citizens and persons within the jurisdiction of the State of Texas of the equal protection of the law.

II.

The court erred in holding that the provisions of said act do not deny to plaintiffs in error the equal protection of the law.

III.

The court erred in holding that the said act and amendments thereto and the authority exercised thereunder, and the causes of action given thereby, and the penalties imposed thereunder are within the police power of the legislature of the State of Texas, and that the State of Texas has the right to discriminate between persons engaged in the same class of business.

IV.

The court erred in holding that the provisions of said act and the amendments thereto do not unlawfully discriminate between those engaged in selling spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, or in the selling of wines manufactured from other fruits than grapes, or in the selling of wines manufactured from grapes grown in Texas while not in the hands of the manufacturer or producer thereof, as contradistinguished from those engaged in the sale of

wines manufactured from grapes grown in Texas while in the hands of the producer or manufacturers thereof, which latter class is exempt from giving bond and from incurring penalties for violating the conditions thereof as provided for in said act.

V.

The court erred in holding that the provisions of said act did not cast special burdens upon those engaged in the sale of wines manufactured from grapes or other fruits or of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication not cast on those engaged in the sale of wines manufactured from grapes grown in Texas while in the hands of the producers or manufacturers thereof.

VI.

The court erred in holding that the provisions of said acts are uniform in their operation throughout the State upon all citizens of the State similarly situated.

VII.

The court erred in holding that said act does not grant special and exclusive privileges to certain citizens which it denies to plaintiffs in error and to other citizens of the State.

VIII.

The court erred in that it impliedly followed the doctrine laid down in the case of Douthit vs. State of Texas, decided Dec. 15, 1904, wherein the Supreme Court of

this State refused to recognize the doctrine as laid down in the case of Connolly vs. Union Sewer Pipe Co., but followed in lieu thereof the doctrine announced in the case of the Louisiana Sugar Refining Co. vs. State of Louisiana, the doctrine announced in said latter case being purely upon a question of classification for taxation, and was not applicable to the act herein complained of.

IX.

The court erred in holding that the provisions of said chapter and the amendments thereto of the Acts of 1897 are not in violation of Section 8, Article 1, of the Constitution of the United States, which confers on Congress the exclusive power to regulate commerce among the several States.

X.

The court erred in holding said laws requiring the giving of said bond by retail dealers in spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, made such bond a valid obligation, and that recovery of penalties thereon could be had against the plaintiffs in error, for that it operated to deprive the plaintiffs in error of their property without due process of law, in that the statutes of the State of Texas provide that no person can be punished in the State of Texas for any act or omission unless the same is made a penal offense, and a penalty is affixed thereto by the written laws of this State, for that there is no law in the State of Texas making it a penal offense for a minor to enter and remain in a saloon, and such act not being defined by

the laws of the State of Texas as an offense, no penalty could be imposed therefor by requiring the giving of a voluntary bond, the recovery upon said bond being recovered as a penalty.

BRIEF.

FIFTH ASSIGNMENT OF ERROR.

The court erred in holding that the provisions of said act did not cast special burdens upon those engaged in the sale of wines manufactured from grapes or other fruits or of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication not cast on those engaged in the sale of wines manufactured from grapes grown in Texas while in the hands of the producers or manufacturers thereof.

SEVENTH ASSIGNMENT OF ERROR.

The court erred in holding that said act does not grant special and exclusive privileges to certain citizens which it denies to plaintiffs in error and to other citizens of the State.

FOURTH ASSIGNMENT OF ERROR.

The court erred in holding that the provisions of said act and the amendments thereto do not unlawfully discriminate between those engaged in selling spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, or in the selling of wines manufactured from other fruits than grapes, or in the selling of wines manufactured from grapes grown in Texas while not in the hands of the manufacturers or producers

thereof, as contradistinguished from those engaged in the sale of wines manufactured from grapes grown in Texas while in the hands of the producers or manufacturers thereof, which latter class is exempt from giving bonds and from incurring penalties for violating the conditions thereof as provided for in said act.

These assignments will be considered together as they relate to the same subject and raise the same question.

FIRST PROPOSITION UNDER FOREGOING ASSIGNMENTS.

So long as the State by its constitution and laws continues to recognize wines, beer and spirituous liquors as articles of consumption, commerce and of sale, so long must continue the duty of the Federal Court to afford such business the same measure of protection as is given to other businesses and to protect those engaged in it against unjust discrimination in so far as same is provided for under the United States Constitution.

STATEMENT.

ARTICLE XVI, CONSTITUTION OF THE STATE OF TEXAS.

Sec. 20. The legislature shall at its first session enact a law whereby the qualified voters of any county, justice's precinct, town, city (or such subdivision of a county as may be designated by the commissioners' court of said county) may by a majority vote determine from time to time whether the sale of intoxicating liquors shall be prohibited within the prescribed limits.

TITLE LXIX. R.S. 1895

Article 3384. The commissioners' court of each

county in the State, whenever they deem it expedient, may order an election, to be held by the qualified voters of said county, or of any justice's precinct, or such subdivisions of a county as may be designated by the commissioners' court of said county, or any town or city therein, to determine whether or not the sale of intoxicating liquors shall be prohibited in such county, justices' precinct, or subdivision of such county, or in any town or city; provided, it shall be the duty of said commissioners' court to order the election aforesaid whenever petitioned to do so by as many as two hundred and fifty voters in any county, or fifty voters in any justice's precinct, or subdivision of such county, as shall be designated by said court, or in any city or town, as the case may be; provided, that if the justice's precinct, or subdivision of such county, embrace within its limits an incorporated town or city, or portions thereof, then such election shall only be ordered when the petition for the same is signed by qualified voters, not less than one-tenth in number of the total vote cast for governor at the next preceding general election in such incorporated town or city; and in case an election is asked for a subdivision of such county, the petition shall describe such subdivision by metes and bounds, and the said petition and description of said subdivision shall be recorded in full in the minutes of the commissioners' court, and such description shall be embraced in the notice given for such election; provided, no city or town shall be divided in making any such subdivision.

Article 3396. When any such election has been held and has resulted in favor of prohibition, and the aforesaid

court has made the order declaring the result, and the order of prohibition, and has caused same to be published as aforesaid, any person who shall thereafter, within the prescribed bounds of prohibition, sell, exchange or give away, with the purpose of evading the provisions of this title, any intoxicating liquors whatsoever, or in any way violate any of the provisions of this title, shall be subject to prosecution by information or indictment, and shall be punished as prescribed in the Penal Code.

The State of Texas, by the above provision contained in its constitution and laws enacted thereunder recognizes the sale of wines, beer and spirituous liquors within its borders, except where prohibited by laws enacted under the foregoing section of the constitution, and acting upon the requirement of said constitutional provision the legislature has provided, among other things, the provision for holding local option elections and likewise provided as to the effect of said elections in prohibiting the sale of wines, beer and liquors within the scope of country embraced within such elections, but under Chapter CIV 1a of the Revised Statutes of Texas hereinafter fully referred to, they provide for the sale of whiskies, wines, beer and medicated bitters capable of producing intoxication in quantities of one gallon or less, under regulations prescribed by said chapter. By so providing in its constitution and enacting a law prohibiting the sale within specified limits in the rest of the State in which local option elections have been carried in favor of local option, the State recognizes the right to pursue the business of a retail liquor dealer under such regulations as may be prescribed by law and subject to such occupation taxes as may be imposed under its Constitution and laws.

Tr., pp. 8 and 9, P. O. Cox applied for license to engage in the sale of liquors in quantities of one gallon or less, to be drunk on the premises in the J. A. Gambler building in the town of Hico, Hamilton County, Texas, and executed a bond, which bond is as follows:

The State of Texas, County of Hamilton:

Whereas, P. O. Cox & Co. desires to engage in the sale of spirituous, vinous or malt liquors and medicated bitters capable of producing intoxication, to be drunk on the premises, in quantities of one gallon or less, at ——, in the town of Hico, in the County of Hamilton, State of Texas, and has made application and paid the taxes required by law;

Therefore, Know All Men by these Presents, That we, P. O. Cox & Co., as principal, and Sam Levy and W. M. Evans as sureties, are held and firmly bound unto the States of Texas in the sum of five thousand dollars, for the payment of which we bind ourselves, our heirs and legal representatives, jointly and severally: Conditioned, That the said P. O. Cox & Co., principal, shall keep an open, quiet and orderly house or place of business for the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, and that they or their agent or employe will not sell nor permit to be sold in their house or place of business, nor give nor permit to be given any spirituous, vinous or malt liquors and medicated bitters capable of producing intoxication, to any person under the age of twenty-one years, or to a student of any institution of learning, or to any habitual drunkard, or to any person after having been notified in writing, through the sheriff or other peace officer, by the

wife, mother, daughter or sister of the person, not to sell to such person; and that they will not permit any person under the age of twenty-one years to enter and remain in such house or place of business; and that they will not permit any games prohibited by the laws of this State to be played, dealt or exhibited in or about such house or place of business; and that they will not rent or let any part of the house or place in which they have undertaken to sell spirituous, vinous or malt liquors and medicated bitters capable of producing intoxication in any quantity to be drunk on the premises to any person or persons for the purpose of running or conducting any game or games prohibited by the laws of this State; and that they will not adulterate the liquors sold by them in any manner, by mixing with the same any drug; and that they will not knowingly sell or give away any impure or adulterated liquors of any kind; then this obligation to be null and void, otherwise to remain in full force and effect.

Witness our hands this 21st day of May, 1892.

P. O. Cox.
Sam Levy.
W. M. Evans.

Examined and approved May 22, 1902.

J. C. Main,
County Judge Hamilton County, Texas.

The record of the case does not show that the license was issued except Tr., p. 2, where it is duly alleged in the petition that the license was procured for the purpose of engaging in the business, and that he did engage in the

business of a retail liquor dealer in the town of Hico, Hamilton County, Texas.

AUTHORITIES AND ARGUMENT.

In the companion case to this, Cox et al. vs. Thompson, reported in the 85 S. W. Rep., p. 34, the court held that no objection being made to the want of proof of the issuance of the license in the lower court, no objection could be urged against it in the Court of Appeals. The State, however, having permitted him to engage in the business of a retail liquor dealer, and he having given bond reciting the payment of the tax and issuance of the license as required by law, thereby became, to all intents and purposes, a retail liquor dealer under the laws of Texas.

We respectfully submit to the court that by virtue of the constitutional provision above referred to and the compliance by Cox with the requirements of the law making his application for license and the execution of the bond provided for by law and engaging under the law in the business of a retail liquor dealer where such business was not prohibited, that he became thereby subject to all the pains and penalties and had all the rights prescribed by the statutes of the State of Texas, which statute is fully set forth hereafter under the next proposition.

The Court of Criminal Appeals of the State of Texas, to which we respectfully invite the attention of the court (ex parte Brown, 38 Tex. Cr. Rep., 295, had under consideration a local option law passed by the legislature under Article 16, Section 20, of the constitution of the State, which law prohibited the storing for other persons in

counties in which local option had been adopted by a vote of the people, and imposed a penalty for violation thereof, and in the discussion of the above section of the Constitution says: "If we had no provision of the Constitution on the subject of local option, we believe that this act would be unconstitutional as an invasion of the fundamental right of a citizen to the free use and exercise of property, and the legislature would not be authorized under the guise of police regulation to so interfere with the enjoyment on the part of the citizen of his property right. *Intoxicating liquors are regarded as property both in the State and nation*, and it is not necessary to refer to acts of legislature or decisions of the court in which intoxicating liquors are so regarded. Furthermore, we have a distinct constitutional provision on the subject of the power of the legislature in regard to liquor traffic: "The legislature shall at its first session enact a law whereby the qualified voters of any county, justice precinct, town, city or subdivision of a county, as may be designated by the commissioners' court of such county, may, by a majority vote, determine from time to time whether the sale of intoxicating liquors shall be prohibited within the prescribed limits." It occurs to us that this expression of the will of the people on the subject is exclusive of any other method to be pursued by the legislature. *Whatever may be said as to the power of the legislatures of other States with no express provision of their constitution on this subject, to legislate in regard to liquor traffic under the general police power, same does not apply with us.* We have an express provision on the subject, and that provision was intended to

prescribe a method of dealing with the question and to exclude any other rule or method so far as local option territory is concerned, citing Holly vs. State, 14 Tex. Cr. App., 514, in which latter case was construed an act of the legislature prohibiting the giving of intoxicating liquors in local option districts, in which this question is asked, "Can the legislature, so long as this constitutional provision remains part of the organic law, in the exercise of its inherent power pass, subject to ratification by the people, an independent general law prohibiting the gift of intoxicating liquors? To concede such power it would be necessary to hold that the constitutional provision was not mandatory, but merely directory."

And, further on in the same opinion, after quoting Cooley on Constitutions, 4th ed., p. 94, lays down the doctrine that whenever the Constitution declares how power may be exercised over any subject, then no power can be exercised over that subject not clearly within the plain import of the language of the Constitution.

The same opinion further holds that "the Constitution defines the circumstances under which the people may prohibit the sale of intoxicating liquors under legislative enactment, and the legislature has attempted to extend the prohibition to a gift and to impose a penalty for giving away intoxicating liquors, which they had no authority to do. The constitution having specified the bounds within which they were to act, it was a direct assumption and usurpation of unwarranted power to go beyond these bounds."

We contend that these decisions of one of our courts of last resort, if they do not expressly decide the fact that

a right in Texas exists under the constitutional provision above referred to for the people of Texas under the limits prescribed by law to engage in the sale of intoxicating liquors, yet they do decide that the legislature can pass no act under the constitutional provision referred to except such as is contained within the terms of the provision, and cannot pass by virtue of its inherent powers an independent prohibitory act, and that this right being granted, will be protected under the Federal Constitution against unjust discrimination.

This honorable court, in this case of Scott vs. Donald, reported in 165 U. S., 110, in effect held that where the State has licensed the sale of liquor within its limits and recognized the sale of it, and importation and the consumption of it as a lawful article of consumption and commerce, so long must continue the duty of the Federal Court to afford to such businesses the same measure of protection under the Constitution and laws of the United States as given to other articles.

We respectfully refer your honorable court also to the case of Mulger vs. Kansas, 123 U. S., 273, holding that if a statute purported to be an act to protect the public health, the public morals or the public safety, has no real or substantial relation to these objects, or is a palpable invasion of the rights secured by the fundamental law, it is the duty of the court to so adjudge and thereby give effect to the Constitution.

We respectfully refer the court likewise to the case of Walling vs. Michigan, 116 U. S., 446, in which, among other things, the court says that the police power cannot be set up to control the inhibitions of the Federal Consti-

tution or the powers of the United States created thereby.

In the case of Leslie vs. Harding, 105 U. S., it is again recognized that ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic like any other commodity in which a right of traffic exists.

We also refer to the case of the State of Minesota vs. Barber, which, while not upon the same subject, involves the same principle. Also the case of Plumley vs. Massachusetts, 105 U. S., 471.

The deductions from these cases and the principles involved establish conclusively the proposition that where a State recognizes by its laws the engaging in the sale of any commodity as a business in the State, that under the federal laws that same protection will be extended to all alike who are thus permitted to engage in such business. Subject to such legitimate regulations as may be imposed by the State, we also respectfully call the court's attention to the case of Vance vs. Vander, Cook & Co., 170 U. S., 438, and under the following proposition will discuss the main issue in the case.

SECOND PROPOSITION.

The discrimination in the Revised Statutes of the State of Texas of 1895, Title CIV, Chapter A-1, and the amendment thereto of the acts of 1897 in favor of the dealer in wines made from grapes grown in the State of Texas while in the hands of the maker or producer thereof, exempting them from the giving of a bond and from incurring penalties for the violations of the conditions of such bond, and imposing such penalties on all other dealers in liquors, wines, beer or medicated bitters, and on all other dealers in wines made from other products than grapes, is repugant to the Consti-

tution of the United States, Fourteenth Amendment thereof, in respect to the equal protection of such dealers under the laws of the State of Texas.

STATEMENT.

We respectfully refer your honorable court to the [redacted] statutes of the State of Texas, which are as follows, regulating the sale of intoxicating liquors in the State of Texas:

TITLE CIV., CHAPTER 1A.

Revised Statutes of 1895.

Article 5060a. Hereafter there shall be collected from every person, firm or association of persons selling spirituous, vinous or malt liquars, or medicated bitters, within this State, an annual tax on each separate establishment, as follows: For selling spirituous, vinous or malt liquors in quantities of one gallon or less than one gallon, three hundred dollars; for selling such liquors in quantities of one gallon or more than one gallon, three hundred dollars; provided, that in selling one gallon the same may be made up of different liquors in unbroken packages, aggregating not less than one gallon. For selling malt liquors exclusively, fifty dollars; provided, that nothing in this article shall be so construed as to exempt druggists who sell spirituous, vinous or malt liquors, or medicated bitters, on the prescription of a physician or otherwise, from the payment of the tax herein imposed; provided, further, that this article shall not apply to the sale by druggists of tinctures and drug compounds in the preparation of which spirituous, vinous or male liquors

or medicated bitters, on the prsecription of a physician or otherwise, from the payment of the tax herein imposed; provided, further, that this article shall not apply to the sale by druggists of tinctures and drug compounds in the preparation of which spirituous, vinous or malt liquors are used, and which compounds are not intoxicating beverages prepared in evasion of the provisions of this chapter.

Article 5060b. The commissioners' court of the several counties in this State shall have the power to levy and collect from every person or association of persons selling spirituous, vinous or malt liquors, or medicated bitters, a tax equal to one-half of the state tax herein levied; and where any such sale is made in any incorporated city or town, such city or town shall have the power to levy and collect a tax upon such sale equal to that levied by the commissioners' court of the county in which such city or town is situated.

Article 5060c. Every person, firm or association of persons desiring to engage in the sale of spirituous, vinous or malt liquors or medicated bitters, shall, before he or they commence the sale of such liquors or medicated bitters, file with the county clerk of the county in which he or they propose to sell such spirituous, vinous or malt liquors or medicated bitters, an application for license to engage in the sale of such liquors or medicated bitters. Said application shall be made on oath, on forms to be provided by the comptroller, and shall designate the place at which it is proposed to carry on the sale of such liquors or medicated bitters; if in a city, the street and number of the house shall be given, and the quantities in

which he or they propose to sell, whether one gallon or more than one gallon, one gallon or less than one gallon, or whether they desire to sell malt liquors exclusively, and shall also state in said application whether or not said liquors are to be sold to be drunk on the premises; and shall pay to the collector of the county in which he or they propose to sell such spirituous, vinous or malt liquors or medicated bitters the entire annual tax herein levied, according to the quantities in which he or they propose to sell, and the entire annual tax upon such business as may be levied by the commissioners' court of such county, and file with the county clerk bond as required in Article 5060g of this chapter. In case the selling of such liquors or medicated bitters be carried on in a city or incorporated town, he or they so selling shall, in addition to the State and county tax herein required to be paid, pay to the collector of taxes in such city or town such tax as may be levied on said business by such city or town, and all taxes herein levied shall be paid in advance. All licenses issued under the provisions of this chapter shall be posted by the licensee in a conspicuous place in his or their place of business, and on failure to so post such license, he or they so failing shall be considered as having no license.

Article 5060d. Upon filing the sworn application as provided in Article 5060c, and paying to the collector the annual State and county tax herein provided for and filing such bond as is required by Article 5060g, the county clerk of said county shall issue to said applicant a license to sell spirituous, vinous or malt liquors or medicated bitters at the place and in the manner and quanti-

ties set forth in the application, and no sale shall be made until such license is procured. The receipt of the tax collector shall be evidence of the payment of the tax. For issuing licenses herein provided for, county clerks shall be entitled to charge a fee of twenty-five cents for each license.

Article 5060e. No license shall be granted for a longer or shorter period than one year. The particular place and house in which the liquors are to be sold shall be designated in the license, and no license shall authorize any person to sell spirituous, vinous or malt liquors or medicated bitters at any other place or house than that designated in the license; provided, that if any person or association of persons having a license to sell such liquors desire to change his or their place of business, such change may be made by presenting the license to the clerk of the county and having the new place of business inserted therein, but in no case to admit of the temporary closing of one place of business to sell at another place.

Article 5060f. The county clerk in each and every county in the state shall, between the first and tenth day in each month, forward to the State revenue agent a sworn statement, giving the names of all persons who have filed applications for license during the preceding month, and the tax collector of each county shall keep a register, in which shall be entered the names of all persons paying taxes under this chapter, with the date of payment, and shall, between the first and tenth day of each month, make to the State revenue agent a sworn report giving the names of all persons who have paid a liquor tax during the preceding month and the character

of tax paid by each. The reports provided for in this article shall be made upon blank forms to be furnished by the comptroller.

Article 5060g. Any person, firm or association of persons desiring to engage in the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, to be drunk on the premises, shall, before engaging in such sale, be required to enter into bond in the sum of five thousand dollars; provided, however, that any person, firm or corporation of persons dealing exclusively in malt liquors shall be required to give bond only in the sum of one thousand dollars, with at least two good, lawful and sufficient sureties, payable to the State of Texas, to be approved by the county judge, conditioned that said person, firm or association of persons so selling spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, in any quantity, to be drunk on the premises, shall keep an open, quiet and orderly house or place for the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication; and that such person, firm or association of persons, or his or their agent or employe, will not sell nor permit to be sold in his or their house or place of business, nor give, nor permit to be given, any spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, to any person under the age of twenty-one years, or to any student of any institution of learning, or to any habitual drunkard, or to any person after having been notified in writing, through the sheriff or other peace officer, by the wife, mother, daughter or sister of the person not to sell to

such person, and that he or they will not permit any person under the age of twenty-one years to enter and remain in such house or place of business; and that he or they will not permit any games prohibited by the laws of this State to be played, dealt or exhibited in or about such house or place of business; and that he or they will not rent or let any part of the house or place in which he or they have undertaken to sell spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, in any quantity, to be drunk on the premises to any person or persons for the purpose of running or conducting any game or games prohibited by the laws of this State; and that he or they will not adulterate the liquors sold by them in any manner, by mixing with the same any drug, and that he or they will not knowingly sell or give away any impure or adulterated liquors of any kind; which said bond shall be filed in the office of the county clerk of the county where the business is conducted, and shall be recorded by such clerk in a book to be kept for such purpose, for which service the said clerk shall be entitled to a fee of seventy-five cents; which said bond may be sued on at the instance of any person or persons aggrieved by the violation of its provisions, and such person shall be entitled to recover the sum of five hundred dollars as liquidated damages for each infraction of the condition of such bond, and the said bond shall not be void on the first recovery, but may be sued on until the full penal sum named therein shall have been recovered. In addition to civil proceedings for individual injuries, brought on said bond as above indicated, if any person, firm or association of persons shall violate any of

the conditions of the bond herein required, it shall be the duty of the county and district attorneys, or either of them, to institute suit thereupon in the name of the State of Texas for the use and benefit of the county, and the amount of five hundred dollars as a penalty shall be recovered from the principals and sureties upon the breach of any of the conditions thereof; and whenever the first or subsequent bond as required is exhausted by suit at the instance of individuals, or for the use of the county a new similar bond shall be given and approved before the dealer shall have the right to further pursue the business of a liquor seller; or, in case suit is pending on any such bond, and the county or district attorney shall make and file an affidavit with the clerk of the County Court that he believes the bond of the defendant will be exhausted by said suit, the clerk shall at once notify the liquor dealer thereof, and it shall be the duty of the liquor dealer, within twenty days from the time the bond is exhausted, or, in other event, within twenty days from the time the notice is given, to give a new bond similar to the bond first given, to be approved in the same way; and until such new bond is given and approved, when it is required by this chapter, the liquor seller shall not have the right to further pursue the business of selling liquors; and any person, firm or association of persons who shall sell liquors in any quantity, to be drunk on the premises, without giving the first bond, or the new bond, as required by this chapter, shall be deemed guilty of a misdemeanor, and on conviction shall be fined the same amount provided for in cases where no license has been obtained. An open house, in the meaning of this chapter, is one in which no

screen or other device is used or placed either inside or outside of such house or place of business for the purpose of or that will obstruct the view through the open door or place of entrance into any such house or place where of business for the purpose of or that will obstruct the view through the open door or place of entrance into any such house or place where liquors are sold to be drunk on the premises. A quiet house or place of business, in the meaning of this chapter, is one in which no music, loud or boisterous talking, yelling or indecent or vulgar language is allowed, used or practiced, or any other noise calculated to disturb or annoy any persons residing or doing business in the vicinity of such house or place of business, or those passing along the streets or public highways. By an orderly house is meant one in which no prostitute or lewd woman or women are allowed to enter or remain; and it is further provided, that said house must not contain any vulgar or obscene pictures. Any surety on such bond may relieve himself from further liability thereon by giving the principal in said bond notice in writing that he will no longer remain as surety on said bond and by filing with the county judge an affidavit that such notice has been given, and if within five days after such notice, if he fail to make a new bond, he shall cease to pursue said business until a new bond is given. And any person who shall continue to pursue said business after such affidavit is filed shall be guilty of a misdemeanor, and shall be punished as provided in cases where no license has been procured; provided, that where the sale is made in good faith, with the belief that the minor was of age, and there is good ground for such be-

lief, that shall be a valid defense to any recovery on such bond.

Article 5060h. An habitual drunkard, within the meaning of this chapter, is one who makes it a habit, or who habitually becomes intoxicated by the voluntary use of intoxicating liquors; and in all suits for the breach of such bond for unlawfully selling to an habitual drunkard, the question whether or not such person is an habitual drunkard shall be determined by the court or jury trying such case, as any other fact.

Article 5060i. *The provisions of this chapter shall not apply to wines produced from grapes grown in this State, while the same is in the hands of producers or manufacturers thereof.*

1897. GENERAL LAWS OF TEXAS.

Chapter 158.

An Act to Amend the Law in Regard to Taxation, and to Regulate the Sale of Liquor by Amending Article 5060a and Article 5060c of Title 104, Chapter 1a, of the Revised Civil Statutes of Texas, and Adding Article 5060j to Said Chapter.

Article 5060a. Hereafter there shall be collected from every person, firm, corporation or association of persons selling spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, in this State, not located in any county, subdivision of a county, justice precinct, city or town, where local option is in force under the laws of Texas, an annual tax of $300 on each separate establishment, as follows: For selling such liquors or medicated bitters in quantities of one gallon or less than

one gallon, $300; for selling such liquors or medicated bitters in quantities of one gallon or more than one gallon, $300; provided, that in selling one gallon the same way be made up of different liquors in unbroken packages aggregating not less than one gallon; for selling malt liquors exclusively, $50. And there shall be collected from every person, firm or corporation or association of persons, for every separate establishment selling such liquors or medicated bitters within this State and located within a county, subdivision of a county, justice precinct, town or city, in which local option is in force under the laws, the sum of $200; provided, the same shall not be sold in such locality except on prescription and in compliance with the laws governing sales in such localities; provided, further, that nothing in this article shall be so construed as to exempt druggists who sell spirituous, vinous or male liquors or medicated bitters capable of producing intoxication, on the prescription of a physician or otherwise, in either locality as above set forth, from the payment of the tax herein imposed; provided further, that this article shall not apply to the sale by druggists of tinctures and drug compounds, in the preparation of which said liquors or medicated bitters are used and sold on the prescription of a physician or otherwise, and which tinctures and compounds are not intoxicating beverages prepared in the evasion of the provisions of this chapter nor the local option law.

Article 5060c. Every person, firm, corporation or association of persons desiring to engage in the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, in this State, as set

forth in Article 5060a of this chapter, shall, before commencing the sale of such liquors or medicated bitters, file with the county clerk of the county in which he or they propose to sell the same an application under oath, on forms provided by the Comptroller, and shall designate the place in which it is proposed to engage in the sale of such liquors or medicated bitters, if any city or town in which streets are named and houses numbered, the street and number of house shall be given, and the quantities in which he or they propose to sell, whether one gallon or more, or one gallon and less than a gallon, or whether they desire to sell malt liquors exclusively; provided, in localities where local option is in force not more than one quart shall be sold at one time to the same person; and shall also state in said application whether said liquors or medicated bitters are to be sold to be drunk on the premises or to be sold on prescription in a local option county, subdivision of a county, justice precinct, town or city; and shall pay to the collector of taxes of the county in which such sales are to be made the full amount of the annual tax herein levied, and such as may be levied by the commissioners' court of such county and the city or town in which sales are to be made; and shall file with the said clerk a bond as required by Article 5060g and 5060j of this chapter. In case the sales are to be made in a city or incorporated town, the taxes by such city or town shall be paid to the collector of taxes of such city or town. All taxes herein levied or which may be levied by a county, city or town shall be paid in advance, and upon the payment of same and full compliance herewith, the county clerk of the county shall issue to the person, firm, cor-

poration or association of persons a license as provided for in Article 5060d of this chapter, which said license and licenses or receipts for the tax or revenues issued by the United States shall be posted by license in a conspicuous place in his or their place of business, and on failure to so post such license, or receipt, he or they so failing shall be considered as having no license and subject to all the pains and penalties as if no such license had issued.

REVISED CRIMINAL STATUTES OF THE STATE OF TEXAS, 1895.

Article 411a. Any person or association of persons who shall engage in the sale of spirituous, vinous or malt liquors or medicated bitters without having obtained license therefor, shall be fined in any sum not less than the amount of the taxes so due and not more than double that sum, or imprisoned in the county jail from ten to ninety days in the discretion of the jury.

Article 411b. Any person or persons who shall sell spirituous, vinous or malt liquors or medicated bitters in quantities not authorized by his or their license, or who shall sell in any other place than that designated in the license, or who shall sell otherwise than authorized by the license, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum from fifty to one hundred dollars or imprisoned in the county jail from ten to thirty days, in the discretion of the jury; provided, that each day any person, firm or association of persons in his or their employ shall engage in the sale of spirituous, vinous or malt liquors or medi-

cated bitters in violation of this article shall constitute a separate offense.

Article 411d. Any person, firm or association of persons who shall sell liquors in any quantity to be drunk on the premises, without giving the first bond, or the new bond, as required by Article 5060g of the Revised Statutes, shall be deemed guilty of a misdemeanor, and on conviction shall be fined the same amount provided for in cases where no license has been obtained.

REVISED CRIMINAL STATUTES OF THE STATE OF TEXAS, 1895.

Article 400. Any person who shall knowingly sell or give, or cause to be given or sold, any spirituous, vinous or intoxicating liquor to any person under the age of twenty-one years, without the written consent of the parent or guardian of such minor, or someone standing in their place or stead, shall be fined not less than twenty-five nor more than one hundred dollars.

The foregoing embraces the laws regulating the sale of intoxicating liquors in this State and imposing penalties for the violation thereof.

P. O. Cox was engaged in the sale of wines, beer and whiskies under his license in the town of Hico, Hamilton County, Texas, it being alleged in the petition [Tr., p. 1] that he had procured license to do business in said place, and executed a bond with P. O. Cox as principal and Sam Levy and W. M. Evans as sureties, conditioned as required by the above statute. [Tr., p. 2.] It also appears that Cox did so engage in business [Tr., p. 26], from the evidence of John May, the man in charge of his saloon, and

that in May, 1902, that he did sell to W. W. Thompson beer, and that he was under the age of 21 years, and did enter and remain in the place of business. To this petition a general demurrer and special demurrer were urged on the ground of the unconstitutionality of the act giving the right of action sued on [Tr., pp. 5 and 6], and were duly overruled, as appears in the judgment of the court [page 35], and judgment rendered upon the verdict for $1,500, for entering and remaining three times. The same questions were again assigned as error on page 42 of transcript before the Court of Civil Appeals, section 14 thereof, which court affirmed the judgment of the lower court. In the application for writ of error to the Supreme Court [Tr., p. 53, Section 1 thereof], the constitutionality of this act was again raised and the writ of error refused to the judgment of the Court of Civil Appeals affirming the case.

AUTHORITIES AND ARGUMENT.

We respectfully invite the court's attention in this connection to the case of Douthit vs. State, reported in 98 Tex., 344, in which the constitutionality of the law in question, by reason of the discrimination set forth, was duly raised, and the Supreme Court of this State held that Article 5060i of act, which read as follows, "The provisions of this chapter shall not apply to wines produced from grapes grown in the State of Texas while in the hands of the producer or manufacturer thereof," would not affect the constitutionality of the act. That it does not make an unreasonable discrimination in favor of producers of native wines, and was not, therefore, void.

That they were unable to distinguish upon any sound principle of law the point involved in this case from that ruled upon by the Supreme Court of the United States in the case of the American Sugar Refining Co. vs. Louisiana, 179 U. S., 98, and held that the exception did not bring it within the case of Connolly vs. Union Sewer Pipe Co., 184 U. S., 450, and which latter case is now relied upon by us in this case as sustaining the above proposition, and we will discuss the difference between the two cases and demonstrate the application of the principle of the latter case to the facts in this case.

In the American Sugar Refining Co. case this court was called upon to construe an act of the legislature of Louisiana entitled "An act to levy, collect and enforce payment of an *annual license tax* upon all persons, association of persons, or business firms and corporations, pursuing any trade, profession, vocation, calling or business, except those who are expressly excepted from such license tax by articles 206 and 207 of the Constitution."

By the ninth section of that act it was enacted that for carrying on such business of refining sugar and molasses, the license shall be based on the gross annual receipts of each person, etc., engaged in said business, as follows: "Provided, that this section shall not apply to planters and farmers grinding and refining their own sugar and molasses, and providing further that it shall not apply to those planters who granulate syrup for other planters during the rolling season."

The question is squarely presented as to whether or not, by reason of said proviso, the defendant in that case was deprived of the equal protection of the law. The court

says: "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable *distinction in principle*, is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon difference of color, race, nativity, religious opinions, political affiliations, or other considerations having no possible connection with the duties of *citizens as taxpayers*, such exemptions would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes. But from time out of mind it has been the policy of this government not only to classify for purposes of taxation, but to exempt producers from the taxation on the methods employed by them to put their products upon the market. The right to sell is clearly an incident to the right to manufacture or produce, and it is at least a question for the legislature to determine whether anything done to prepare a product most perfectly for the needs of the market shall not be treated as an incident to its growth and production. The act is *not* one exempting planters who use their sugar in the manufacture of articles of a wholly different description, such as confectionery, preserves or pastry, or such as one which should exempt the *farmer who devoted his corn or rye to the making of whisky*, while other manufacturers of these articles were subjected to a tax. A somewhat different question might arise in such case, since none of these articels are the natural products of the farm—such products only becoming useful by being commingled with other ingredients. Refined sugar, however, is the natural and ultimate product of the cane, and the various steps taken

to perfect such product are but incident to the original growth."

This court has directly held that the liquor business comes within the domain of domestic trade and commerce, which we have shown under the first proposition.

It does not seem possible to misconstrue the import of the foregoing decision. There it is expressly held that the act in question undoubtedly discriminates in favor of a certain class, but it is held, with more or less clearness, that in a classification for purposes of taxation more latitude is allowed than in other things, and that the policy of the government has been, for time out of mind, to exempt producers from taxation of the methods employed by them to put their products upon the market. That, therefore, while the act discriminates, yet, by reason of the latitude allowed in matters of taxation, and allowed on account of the settled policy of our government, such discrimination is held to be not repugnant to the constitution. To accentuate the meaning of the court in this regard, a case is stated almost identical with the case at bar, in which they say *that a different question might arise, to-wit: an act which would exempt the farmer who devoted his corn or rye to the making of whisky while other manufacturers of these articles were subject to a tax;* the basic principle involved being that the refining of sugar is merely the rendering more pure or the natural and ultimate product of the cane, and the various steps taken to perfect such production are but incident to the original growth.

This different question arises exactly in this case.

The distinction between this case and the case of Con-

nolly vs. Union Sewer Pipe Co., reported in 184 U. S., page 640, appears to us to be so plain and obvious that the Supreme Court of the United States would have done violence to its traditions in construing the constitution had it rendered any other decision than that referred to.

It should be borne in mind that the act of which we complain involves taxation and regulation and penalties. The caption of the act itself, which is as follows, shows this plainly: "An act to *regulate* the sale of spirituous, vinous or malt liquors or medicated bitters; to fix a *tax* upon all persons or associations of persons selling such liquors; to define the time and manner of collecting such tax; to fix *penalties* for the violation of this act, and to repeal all laws and parts of laws in conflict with the provisions of this act." [General Laws of Texas, Acts 1893, p. 158, which has been adopted in the revision of 1895.]

Now, we do not contend that this act is void as to the features contained in it with reference to taxation, *unless, of course, under the Connolly case the whole act should fall upon another principle*, but we do contend that the act, in so far as it prescribes regulations, amongst others, to-wit: the giving of the bond sued on, is void, and that it does not come within the Louisiana Sugar Refining Co. case, for the act complained of, like the one there, discriminates, and unless the effect of the discrimination should be avoided by the exceptions therein made, or some other exceptions supported by sound principles of law, it must fall.

If the act complained of provided only for the occupation tax, as did the Louisiana law, we are free to confess that more difficulty might have arisen in distinguishing

the case from the Sugar Refining Co. case, for such a state of case would have presented the exact query presented there.

The question of classification and the applicability of the Sugar Refining Co. case was duly discussed in the Connolly case, and why, with such a full discussion and with the points so sharply made between the opinions of the majority and the minority, our court could not see the difference between the case as here presented and the Sugar Refining Co. case, is a mystery to us.

The exception in our statute is so nearly identical with the exception in the Illinois statute that it is practically a verbatim copy.

If the exception in the Illinois case destroyed the Illinois statute, certainly the exception in the Texas statute should destroy that statute, unless there is some clear distinction which is supported by sound principle. The Illinois statute was for the purpose of defining the trusts and making certain acts and violations thereof misdemeanors, and prescribing punishment thereof.

The Texas act, in so far as we desire to deal with it, was an act for the regulation of retail liquor dealers, and provided, amongst other things, for the giving of the bond sued on and penalties for the violation thereof.

The distinction between the two, to the legal mind, can not be grasped unless it should be held that the whole of the Texas act is so incidental to its taxing feature that all of its provisions, except the taxing feature, will be held to be of no moment. Such a holding, upon its face, tested by sound logic and law, would be manifestly absurd, for it is apparent that the regulating features of the act are

as fully an important and integral portion thereof a the taxing feature, if not more so. The only point that can, or rather could, at that time have been made preseting a plausible reason for sustaining the act as constitutional is that it comes within the police power of the State, a point we will hereafter consider in connection with the Connolly case.

It seems to us that in deciding the question here presented the whole matter depends upon the answer given to the query propounded in the opinion of Mr. Justic McKenna, dissenting in the Connolly case, in which he says: "Can the cases be distinguished because in one a tax was imposed and in the other conduct was regulated or penalized?" This is the identical question which we now propound, waiving the distinction made in the Sugar Refining Co. case. Mr. Justic McKenna, in his dissenting opinion, answers this question as follows: "Indeed, is not the distinction verbal, each being means to an end Is not a parallel obvious? Besides, what justification for the distinction is there under the Constitution? None, I submit, can be found in the words of that instrument."

The answer to the query necessarily propounded to our Supreme Court in the Douthit case is practically identical with that of Mr. Justice McKenna, and while his answer furnishes high authority for our Supreme Court yet nevertheless it is not the highest authority, nor is it authority which ought to be followed when the answer of the majority of the court is exactly to the contrary and is the law until overruled.

The query propounded and heretofore set out makes the issue so plain that it would seem as if he who runs

may read, and recognize the fact that upon an answer to that question, which involves the very point, alone should depend the decision of this court in this case.

The answer of the majority of the court in the opinion rendered by Mr. Justice Harlan is clear, decisive and direct, leaving nothing to inference, and clearly distinguishing it from the case which Mr. Justice McKenna regarded as controlling, and which has also governed our own Supreme Court, to-wit: the Sugar Refining Co. case. After summarizing and dealing with the case, he says: "The decision now rendered is not at all in conflict with the views expressed in the two cases just cited. It is sufficient to say that those cases had reference to the taxing power of the State, and involve considerations that could not, in the nature of things, apply to a State enactment like the one involved in the present case. The power to tax persons and property is an incident of sovereignty, and the extent to which it may be exerted has been indicated in numerous cases. Taxing laws, it has been well said, furnish the measure of every man's duty in support of the public burdens and the means of enforcing it. * * * It is one thing to exert the power of taxation so as to meet the expenses of government, and, at the same time, indirectly to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce." And here

we might remark, were it not that this decision deals expressly with the question as to whether or not the act is justifiable under the police power, it might well be contended that such was the case, but the decision pointedly answers the contention made by counsel therein and leaves no room for argument along that line. It says: "The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but, if by their necessary operation its regulations looking to either of those things amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void." The very exception in terms has been passed upon, and it has been held that it is not a proper classification, and is not justified under the police power.

Can anything be plainer or more in point?

We do not doubt but that the Supreme Court of this State is thoroughly convinced of the correctness of their holding in the Douthit case, as an abstract proposition of law, for when we read in the 95 Texas, page 611, in the case of the State of Texas vs. Compress Co., which involved the constitutionality of the Texas anti-trust act, the following expression of our Supreme Court, to-wit: "We believe that our decision is correct and that the law is not in contravention of the Constitution of the State, nor of the United States," we cannot help but see that the ideas announced by Mr. Justice McKenna permeates the justices of our Supreme Court, and believing that they are fully imbued with the correctness of their decision as aforesaid, we think that the difficulty now presented, and which most forcibly presents itself to the court, is that of finding some distinction which will enable them to apply

the Sugar Refining Company case in accordance with their own views. That court, in the 95 Texas, used the following language: "We recognize the superior authority of the Supreme Court of the United States upon this question. and in obedience to its decision we shall hold that in so far as the law of 1895 comes within the terms of the Connolly case, it is invalid; it will not support an action by the State to recover a penalty for the violation of the law, nor will it in suits between corporations or individuals support a distinction based upon the fact that the right of action originated in a violation of the anti-trust law. But to the extent that the statute of this State is not embraced in the decision of the Supreme Court of the United States, we shall adhere to our former decisions that it is constitutional and valid, and therefore enforcible by the State."

The expressions in this case are strong examples of the great unwillingness which has actuated our court in following the Connolly case to the extent it did. These expressions, however, show that the Connolly case was followed by them to the extent that a penalty could not be recovered under our anti-trust act, which they hold to be in all essential particulars the same as the act of 1895. Have they not, then, in effect, answered the question propounded by Mr. Justice McKenna, by saying we do not believe that the majority opinion is correct, but it is our duty to follow it, and we do follow it, and no recovery of a penalty can be had by reason of the decision in the case.

Wherein has it in any way, in any decision, been pointed out that our statutes regulating the liquor traffic is more analogous to that under consideration in the Sugar Refin-

ing Co. case than to the anti-trust acts of Texas and Illinois? True, the liquor traffic statute contains features analogous to the Louisiana statute, because it imposed a tax, but in so far as it regulates it, to our mind, is an analogous to the anti-trust acts herein discussed as one case can well be to another. Our Supreme Court has not furnished to the profession any points wherein they make a distinction, but simply say they think the case is governed by the Sugar Refining Co. case. At some time, by some court, the distinction, if any exists, must necessarily be defined and shown, for until that time the mind of the profession will not be satisfied.

The Supreme Court of the State of Missouri, in the case of State vs. Bengsch, reported in 70 S. W. Rep., 710, on page 720 holds that a statute imposing upon manufacturers of liquor for sale in the State of Missouri a tax of 10 cents a gallon and exempting from the operation of the tax manufacturers who manufacture in that State liquors for sale in other states, unconstitutional, as violative of the Fourteenth Amendment of the Constitution, which guarantees to each citizen of the United States and of each particular State "the equal protection of the laws."

We concede, as we have always done, that the State can, for the purposes of taxation, exempt one class from the operation of the law and impose tax upon other classes of a different character, under the case of the Sugar Refining Co. vs. Louisiana, but can it under the guise of regulating the sale of intoxicating liquors, impose penalties upon one party engaged in said occupation not imposed upon another engaged in the same occupation, and would such imposition be justified as a police regulation?

The caption of the law of Texas regulating the sale of intoxicating liquors is styled: "Liquors—Sale of Regulated—Taxation. An act act to regulate the sale of spirituous, vinous and malt liquors or medicated bitters; to fix a tax upon all persons or association of persons selling such liquors; to define the time and manner of collecting such tax and to fix penalties for the violation of this act, and to repeal all laws and parts of laws in conflict with the provisions of this act."—General Laws of the State of Texas, Twenty-third Legislature, page 177.

The sections of this act are all set forth in the foregoing pages of this brief as carried forward in the Revised Statutes of 1895, under which the bond in question and involved in the suit was given.

The provisions contained in the bond taken in connection with the exemptions in Article 5060i of the act show that this is no police regulation per se and can not be justified upon that ground, for it is just as injurious to the public morals and to that of the youths for them to enter and remain in a saloon where domestic wines are sold, though in the hands of the producer, as where imported or foreign wines are sold, or wines made from other fruits. It is just as injurious for them to drink grape wines as other wines or malt or spirituous liquors. The taste for strong drink is cultivated as well by one as by the other; the habits cultivated in one place are as injurious as in the other.

The principle announced in the American Sugar Refining Co. vs. Louisiana, 170 U. S., 283, involved a question of classification for taxation purely, and no other question was involved. *Traffic in spirituous, vinous or malt*

liquors is legalized in this State, except where prohibited by elections under the local option laws, enacted under our Constitution, and dealers in it are entitled to equal protection of the laws and can not be subjected, under the guise of classification for taxation, to penalties imposed upon one class and not imposed upon another. Legislation discriminating against such articles imported from another State has been held to interfere with commerce between the States, and is void, where it is a lawful subject of sale, nor can the legislature of the State, under the guise of police regulation, enact a law that will infringe upon the rights guaranteed to the citizens of the United States by its Constitution. [See Walling vs. Mich., 116 U. S., 446.] *The sale of liquors is legal in this state by reason of our constitutional provisions and statutes*, yet we concede that the legislature has the right to tax and regulate it, but in doing so must make the statute operative so far as penalties are imposed and conditions placed upon same upon all engaged in the business alike. Mr. Harlan, in the Connolly case, states "that it is one thing to exert the power of taxation so as to mee the expense of the government, and at the same time indirectly to build up or protect property interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce and discriminate against some by declaring that particular class within its jurisdiction shall be exempt from operation of a general statute making it criminal in its effect to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exercise of the power of classification. It rests on no reasonable basis, is purely arbi-

trary and plainly denied the equal protection of the law to those against whom it discriminates." Applying this principle to the facts of the case at bar, we do not see but that if the sale of spirituous, vinous and malt liquors are injurious under the conditions and limitations embraced in the statute, and are hurtful to the morals, they should properly be so limited and restricted, yet it is impossible to perceive why the sale of domestic grape wines, in the hands of the producer or manufacturer, are not likewise injurious and should be sold under the same limitations and restrictions, except for the desire of the State to protect and encourage the manufacture of domestic grape wines in preference to other wines or foreign wines.

One man owns his vineyard, or buys his grapes grown in Texas and maufactures them into wines of various kinds and strengths, goes to a city and rents a store next to a saloon. Under the law he can sell without license or the payment of a tax. The State can grant this right if it desires to do so. Under the same law he is permitted to sell without bond. He can put up screens and can rent part of the premises he occupies to a gambler, sell or give wine, knowingly, to minors, students of institutions of learning and habitual drunkards, and to any other person he desires. He can permit minors to enter and remain in his saloon. He can permit games to be played upon the premises, which are prohibited by law. He can permit women to enter, drink and remain upon the premises. Can have music therein, with loud and boisterous noise. In fact, make a *gilded hell* of his place of business, but no penalty can be placed upon him under a bond. While the saloon keeper, the dealer in foreign wines or do-

mestic wines bought on the market, or spirituous and malt liquors made in Texas or elsewhere, for the doing of each of the above enumerated acts would incur, under the bond required of him, penalties aggregating one thousand dollars for each infraction thereof. So would a dealer in blackberry wine, or any other wine, except grape wines, though made in Texas, and in the hands of the producer or manufacturer thereof.

We ask the court, under what rule of classification can such legislation be sustained as consistent with equal protection of the laws, yet one class the law denominates criminals, the other selling vinous liquors, produced or made by them are not; yet the product sold by them produces the same effects when drunk to excess, but in the latter case the opportunities for vice are double without incurring any penalties of any character, under this section of the act. This is no police regulation, but is gross discrimination.

We think that further argument to establish the fact that this law is not a police regulation and does not bear upon all classes alike, and is therefore void, as violative of the Constitution of the United States, would be useless. But, if unconstitutional, then what would be its effect to do away with requiring bonds, or require dealers in domestic wines to give bonds? The rule is, that if different sections of an act are independent of each other, that which is unconstitutional may be disregarded and the valid sections may stand and be in force, but if the obnoxious sections are of such import that the other sections, without them, would cause results not contemplated by the legislature, then the entire statute relating to that obnoxious feature must fall.

Section 5060g of the act requires all persons, firms or associations of persons desiring to engage in the sale of spirituous, vinous and malt liquors or medicated bitters, to be drunk on the premises, to give bonds with security. If, then, section 5060i, exempting from its operation dealers in wines made from grapes grown in Texas, while in the hands of the maker or manufacturer, were held inoperative, that class would be included in those mentioned in Article 5060i, and be required to give bond and security, and would thereby incur penalties for the violation of its conditions when such was not the legislative intent. The statute, in this respect, it appears to us, must be regarded as an entity, and so much of it as relates to the giving of a bond and imposes fines and penalties recoverable under the bond for infraction of its conditions must be declared void.

In addition to the foregoing authorities, the Supreme Court of the State of Texas, in the case of the Pullman Palace Car Co. vs. State of Texas, 64 Tex., 275, decided by Justice Staten, which called in question a law of the State of Texas imposing upon every firm, person or association of persons owning or running any palace, sleeping or dining cars not owned by the railway company of Texas in this State an annual tax of two dollars per mile operated, in which the question arose as to the effect of an unconstitutional statute of the character named, held: That the legislature alone can impose taxes and determine what occupations shall be taxed, and when it imposes an occupation tax and expressly declares that persons or corporations shall not be subject to it, the courts have no power to declare that they shall, but they

have the power to declare that the act by which said discrimination is made is inoperative upon those upon whom the burden is attempted to be imposed and is violative of the rule requiring equality and uniformity.

The doctrine laid down in this case with reference to the effect of a law void because unconstitutional, is followed in the case of ex parte Overstreet, 39 Tex. Cr. App., 475; Ex parte Jones, 38 Tex. Cr. App., 458; Gustaffos vs. State, 40 Tex. Cr. App., 71; Rainey vs. State, 53 S. W. Rep., 882.

We now come to the question as to the effect of deciding the act void in so far as it requires the giving of a bond.

In this connection we would call the court's attention to the case of Giozza vs. Tiernan, 148 U. S., 657, in which the constitutionality of the act of this State in 1887, requiring the giving of a bond by liquor dealers selling in quantities of quarts or less, was called in question, and on appeal was heard in this honorable court, in which Chief Justice Fuller, in deciding the case, used the following language: "This statute affects all persons in Texas engaged in the sale of liquors in exactly the same manner and degree, whether considered as imposing restrictions upon the sale in the exercise of the police powers of the State or as levying taxes upon occupations under the authority of the legislature. In that behalf petitioner was not arbitrarily deprived of his property nor denied the equal protection of the laws."

The act under which this decision was made was repealed by Section 14 of the act of 1893, page 177, which repealed all laws and parts of laws in conflict therewith. Under the law of 1887, Revised Statutes of Texas, 1895,

section 3380, under which the above decision was given, bonds were only required to be given by dealers who sold in quantities less than a quart, whether to be drunk upon the premises or not, and the conditions of said bond were different in that he was not bound by the acts of his agent or employe, but bound only when sales or gifts were made by the owner of the business, and in that the exception on which we base our appeal was not contained in that act. The conditions of the former bond provided for in the act of 1887, which part of the law is as follows, to-wit:

"Any person, firm or association of persons desiring to engage in the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, shall, before engaging in such occupation, be required to enter into bond in the sum of five thousand dollars, with at least two good, lawful and sufficient sureties, payable to the State of Texas, to be approved by the county judge, conditioned that said person, firm or association of persons so selling spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, in quantities less than a quart, shall keep an open, quiet and orderly house or place for the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication; and that he or they will not sell or permit to be sold in his or their house or place of business, nor give, nor permit to be given, any spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, to any person under the age of twenty-one years, or to a student of any institution of learning, or to any habitual drunkard, or to any person after having been notified in writing through the sheriff or other peace of-

ficer, by the wife, mother, daughter or sister of the person not to sell to such person; and that he or they will not permit any person under the age of twenty-one years to enter and remain in such house or place of business; and that he or they will not permit any games prohibited by the laws to be played, dealt or exhibited in or about such house or place of business; and that he or they will not keep, or permit to be kept, for rpofit, amusement or other purposes, in or about his or their place of business any nine or ten-pin alley, pool table, bagatelle, pigeonhole or jenny-ling table, nor any other kind of table or device used for games of chance; and that he or they will not rent or let any part of the house or place in which he or they have undertaken to sell spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, in quantities less than a quart, to any person or persons, for the purpose of running or conducting any game or games prohibited by the laws of this State; and that he or they will not adulterate in any manner, by mixing any drug with any intoxicating liquor of any kind; and that he or they will not knowingly sell or give away any impure or adulterated liquor of any kind."

We submit that the holding of Section 5060g, Revised Statutes, 1895, void in so far as the requirement of the bond and imposing penalties for the violation thereof is concerned, would not give any right to sustain the judgment rendered by the court upon a bond required by the statutes of 1887, as the bond required by the act of 1887 applies to a different class of persons engaged in the business than those embraced in the bond given under the law in question, which only applies to dealers selling gallons or

less to be drunk on the premises, and also contains conditions not embraced in the law of 1893, Article 5060g, R. S., 1895, which is before the court for construction and does not contain the exception complained of. This bond being a bond highly penal in its nature, should be strictly construed so far as it affects the principal and sureties in this case, and when construed strictly could not be held to apply to this case, and to sustain the judgment rendered upon the verdict of the jury imposing penalties upon the defendant and his sureties for three infractions of the bond, all the ofenses being for violating the same condition of the bond.

Under the foregoing views of the laws of the State, the case of Giozza vs. Tiernan, above referred to, would have no application except inferentially, and would only tend strongly, indeed, very strongly, to uphold the contention made by us under the second proposition that this law, so far as it requires the giving of the bond in question is concerned, and imposes penalties for the violation thereof, is void and of no effect, and that no recovery can be had upon a bond not given under Article 5060g, required by Article 411a of the Criminal Code, 1895.

CONCLUSION.

In presenting this case we are aware of the reluctance with which courts interfere with local statutes regulating the sale and use of spirituous liquors, the intemperate use of same is productive of great evils, and unless the statute under consideration is violative of the Constitution of the United States this court will not declare the act void. But when the legislature, acting under the Constitution,

recognizes, as it has done under the foregoing statute, spirituous, vinous and malt liquors as articles of lawful consumption and of commerce, then it is the duty of said legislature in passing laws regulating the sale of same to make same bear equally in its provision upon all parties within the limits of the State engaging in the business, and if in the opinion of this court, as was said in the case of Scott vs. Donald, "the statute is unconstitutional, then so long must continue the duty of the Federal Court to afford to such use and traffic in same the same measure of protection under the Constitution and laws of the United States as is given to any other legitimate business."

We respectfully submit to the court that the law in question should be held unconstitutional in so far as it attempts to impose unequal burdens, and that the bond required to be given thereunder is void, and that the judgment of the lower court should be reversed and the case dismissed.

F. E. Albright

Attorney for Plaintiffs in Error.

Of Counsel:

L. B. Croik

A. Lawrence Jr.

Geo. Sanford.